

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

**ROCKY MOUNTAIN PLANNED PARENTHOOD,
INC. D/B/A PPRM**

Employer

and

Case 27-RC-205940

**SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 105**

Petitioner

REQUEST FOR REVIEW OF DECISION AND DIRECTION OF ELECTION

Pursuant to the Regional Director's ("RD") Certification of Representative dated January 2, 2018 (and attached notice of Right to Request Review) and § 102.67 of the Board's Rules & Regulations, the Employer, Planned Parenthood of the Rocky Mountains ("PPRM" or "Employer"), submits the following Request for Review in the above-referenced Case.

I. INTRODUCTION

PPRM seeks review of the RD's November 13, 2017 Decision ("Decision") because of inappropriate exclusion of employees designated as clinical staff at PPRM's Alamosa, Durango, Cortez, and Salida, Colorado; New Mexico; and Nevada facilities from the bargaining unit.¹ In

¹ As stated in the Decision: In Board Exhibit 2, the parties stipulated that the appropriate unit(s) should include the following classifications and that a *Sonotone* election would be appropriate given the proposed inclusion of professional employees in a unit with non-professional employees:

Group A Included: Advanced Practice Nurse I, Advanced Practice Nurse II, Advanced Practice Nurse III, Traveling Advanced Practice Nurse, RN for Surgery Center, RN for Surgery Center 2, Float Advanced Practice Nurse, Float RN.

Group B Included: Health Center Assistant, Health Center Assistant III, Advanced Health Center Assistant, Float Health Center Assistant III, Float Health Center Assistant, Float Advanced Health Center Assistant, Regional Traveling Advanced Health Center Assistant, Traveling Advanced Health Center Assistant III, Traveling Health Center Assistant.

(Decision, p. 1, n. 2.)

doing so, the RD failed to consider or disregarded community of interest factors long recognized by Board rules, policies, and precedent. The RD's Decision satisfies three of the various grounds for review set forth below, warranting Board review and modification of that Decision.

II. GROUNDS FOR REVIEW

Under its Rules and Regulations, the Board grants a request for review only where compelling reasons exist. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of:

(i) the absence of; or

(ii) a departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

29 C. F. R. § 102.67 (d).

Under this section, the Board has the authority to review all aspects of record and make findings and conclusions different from those of a regional director in representation cases. *NLRB v. Sav-On Drugs*, 709 F.2d 536, 542 (9th Cir. 1983). PPRM respectfully submits that there are bases for review under several factors enumerated in §102.67.

III. ANALYSIS

a. A Substantial Question of Law and Policy is Raised.

PPRM submits that substantial questions are raised for several reasons. First, the RD failed to apply the proper presumptions applicable to the petitioned-for multi-facility unit. Indeed, the RD accurately stated that “[t]he Board does not apply a presumption in favor of finding petitioned-for multi-facility units to be appropriate. Nor does it apply a presumption against finding a petitioned-for multi-facility to be appropriate.” (Decision, p. 5) (*citing Exemplar, Inc.*, 363 NLRB No. 157, slip op. at 2). The RD, however ignored the guidance set forth in the Board’s Hearing Officer’s Guide (“Guide”) which states, in accordance with PPRM’s argument, that “an employer-wide unit is a presumptively appropriate unit.” (Guide, p. 75). *See also Acme Markets, Inc.*, 328 N.L.R.B. 1208 (1999).

Second, the RD disregarded or failed to consider substantial evidence on most of the factors and questions set forth in the Guide and improperly considered or resolved additional factors in determining that the petitioned-for multi-facility unit was appropriate (without the Salida Health Center that Petitioner sought to include). At pages 74-76, the Guide includes eight factors the RD should consider where a multi-facility unit is sought by a labor organization, along with nine sets of related questions. The RD assessed only a handful of the factors included in the Guide. Further, the RD analyzed the extent of union organization and employee choice, which are not among the factors or questions the Guide advises hearing officers to consider. Moreover, the RD completely disregarded employee choice in failing to allow New Mexico and Nevada employees the ability to exercise their Section 7 rights in the election.

Third, the RD disregarded or failed to consider substantial evidence on most of the factors set forth in the Guide with respect to the seven Community of Interest Questions set out at pages

72-74, and the twenty-one factors to be considered under Question 7 alone, and failed to properly compare terms and conditions of the petitioned-for employees with those excluded. For these reasons, substantial questions of law and policy are raised in this matter.

Lastly, the RD cited, but departed from officially reported Board precedent, namely, *Acme Markets, Inc.*, 328 N.L.R.B. 1208 (1999). (Decision, p. 9). There, the Board concluded that a “four-state, employerwide [sic] unit is an appropriate unit” on facts not nearly as strong as those in the present case.² In *Acme*, one Director of Pharmacy oversaw the entire four-state pharmacy operation. Here, PPRM’s three-state operation is overseen by a senior leadership team based in Denver (Record: 25-32). 328 N.L.R.B. at 1208.

In *Acme*, five area pharmacy managers (APMs) reported to the Director – one APM had responsibility for three states, two APMs split the pharmacies in Pennsylvania, and two APMs split pharmacies in New Jersey. *Id.* Here, PPRM employs three Regional Directors, one of whom has responsibility for Nevada, New Mexico, and Southern Colorado, while the other two Regional Directors (one of whom was on leave at the time of the hearing) and Senior Directors split Health and Surgical Centers in Colorado and New Mexico. (Record: 27; Employer Ex. 10). The PPRM Regional Directors and Senior Directors report to the Vice President of Clinical Operations who, in turn, reports to the Executive Vice President and Chief Operating Officer, both of whom work in Denver. (Record: 28-30; Employer Ex. 28). The fact that there were local pharmacy managers, just like the local Health Center managers utilized by PPRM, did not change the Board’s conclusion that an employer-wide unit was appropriate. In addition, the administrative structure here extends to all three states, just like the administrative structure in *Acme* extended to all four

² The Board rejected the regional director’s approach in *Acme*, similar to that taken by the RD here, separating units limited to pharmacies in in each of three separate states and excluding New Jersey, and agreed with the employer’s proposed employer-wide unit that would include New Jersey.

states. *Id.* At 1209.

In *Acme*, pharmacy operations were standardized, personnel and labor relations policies were developed and administered centrally, and evaluation and disciplinary procedures were common to all facilities. *Id.* Here, all the Health Center operations are standardized as they provide the same core services such as health exams, pregnancy testing, and STD and HIV testing, regardless of the state in which they are located (Record: 160); timekeeping, payroll, accounting, records management and compliance are all run out of Denver regardless of location (Record: 157-59; 178); and the operations of each clinic are fully integrated into the Planned Parenthood Federation of America medical standards and guidelines, which are enforced by the Clinical Quality and Management Team out of Denver for all locations (Record: 25, 32, 74, 159-60, and 218). Personnel and labor relations policies, such as the PPRM Employee Handbook and Supervisors Human Resources Policies and Procedures Manual, are all implemented and enforced centrally by Human Resources out of Denver for all locations (Record: 54-55, 192-93, and 208-09). Also, evaluation and disciplinary policies and procedures are common to all facilities and are run almost entirely out of Denver by Human Resources and the three PPRM Regional Directors (Record: 191, 214; Employer Exs. 20-23).

In *Acme*, pay for pharmacy managers and staff pharmacists was largely the same. *Id.* Here, APNs, RNs, and HCAs all received the same pay *and* benefits such as health insurance, 401 (k), leave entitlements, and workers' compensation. (Record: 74, 159, 178-79, 201, 208, and 229-31). As in *Acme*, skills and job duties are the same regardless of whether APNs, RNs, or HCA's are located in Colorado, Nevada, or New Mexico. (Employer Exs. 5, 6, and 7).

In *Acme*, the Board found it significant that while each state had different licensing requirements for pharmacists, some Acme pharmacists were licensed in more than one state – at

least four were licensed in Pennsylvania and New Jersey and provided fill-in coverage at pharmacies in both states *on a sporadic basis*. *Id.* (emphasis added). Here, PPRM has a specific program for Float and Traveler employees (Employer Exs. 25, 26, and 27), where all must be able to travel to and be licensed in all three states (Record: 35, 39, 56, and 164-67). Additionally, the On-Call staff must be licensed in and be able to take calls from patients located in all three states. (Record: 39).

In *Acme*, training seminars and participation in special trade events were open to pharmacists regardless of the state in which they worked. *Id.* Here, orientation and training are run entirely out of Denver, and employees from all three states travel to Denver for such training. Human Resources, the training department, and the Senior Leadership Team all travel to Health Centers in all three states for training and education. (Record: 33, 159, 161-63, 194-95).

In *Acme*, the Board rejected the same arguments raised here by the Petitioner and relied upon by the RD, namely, that there is a “lack of substantial interchange or contact between pharmacists in those three states and their counterparts in New Jersey.” Finally, in *Acme*, the Board concluded that the record there failed to show that the community of interest for pharmacists in the three petitioned-for states was distinct from the community of interest they shared with those in the New Jersey stores. The Board found there, just as it should find here, that an employer-wide or overall unit that makes legal and common sense.

b. The Regional Director’s Decision on Substantial Factual Issues Was Clearly Erroneous.

In her Decision, the RD glosses over the Board maxim that “[e]xtensive evidence is not normally necessary when *all* of the employer’s facilities are sought in a combined unit, for an employer-wide unit is a presumptively appropriate unit.” Guide, p. 75 (emphasis in original). In

fact, PPRM's proposed unit was the only presumptively appropriate unit presented in this case. PPRM now turns to the errors made by the RD, in the order raised, in resolving material or substantial factual issues, or in applying those factual issues in this case.

i. Centralized Control of Management and Supervision.

The RD spends over four pages of the Decision (pp. 6-10) detailing the overwhelming and undisputed evidence of centralized control, supporting PPRM's overall unit, then concludes erroneously that this factor supports the petitioned-for unit (which the RD effectively determines elsewhere is not an appropriate unit because Petitioner sought to include Salida, which the RD then excluded) (Decision, pp. 18-19). PPRM's COO testified at length about centralized management and supervision of all Health Centers in all three states. (Record: 26-40; see also Employer Exs. 10, 12, and 28). She and the Director of Human Resources also testified at length to all of the operational and human resources or labor relations functions that are handled centrally, such as purchasing for all of the Health Centers, record-keeping, hiring, interviewing, disciplining, discharging, promoting, transferring, and training applicants and employees in the bargaining unit. (Record: 152-63; 191-95). While the local Health Center managers have some limited autonomy with these issues, the overwhelming majority of issues have to be run by leadership or human resources located in Denver, regardless of the state in which they are located. This evidence should have led the RD to find that this factor favored the overall unit proposed by PPRM; however, the RD erroneously concluded that it favored the Petitioner. (Decision, p. 19).

ii. Geographic Proximity.

Contrary to guidance provided by the Sixth Circuit in *Bry-Fern Care Center, Inc. v. NLRB*, 21 F. 3d 706, 710 (6th Cir. 1994), the RD here largely treated geographic separation as dispositive. The most glaring examples of this are that the RD excluded Salida which is 149 miles from the

Denver Stapleton headquarters for all of PPRM, yet included Glenwood Springs and Steamboat Springs which are both farther away than Salida. (Decision, p. 10). The RD then fails to give appropriate weight to the substantial evidence of similar proximity between Southern Colorado (including Salida in the petitioned-for unit) locations and New Mexico locations. (Record: 168-71; Employer Exs. 13-16).

Perhaps the most strained aspect of the RD's reasoning in this part is the conclusion that Granby and Steamboat Springs should be included in the bargaining unit because they only have one employee each and would be, in effect, impermissible orphan units of one employee (Decision, pp. 11-12), while simultaneously not applying the same reasoning to Salida, Alamosa, and Cortez, Colorado and Rio Rancho, New Mexico, all of which only have or had one employee. (Decision, pp. 4-5). Such an approach is arbitrary and defies common sense and logic.

iii. Functional Integration/Employee Interchange.

The RD essentially treated these separate factors as one and the same, though the NLRB's own Guide (pp. 74-75) recognizes that they are separate and distinct. Functional integration, when considered appropriately as a single factor, clearly favors the overall unit proposed by PPRM. Both the COO and Human Resources Director testified without rebuttal to significant functional and service/product integration among the Health Centers in all three states: use of a central warehouse and centralized purchasing; centralized recordkeeping and records management; centralized setting of similar rates of pay; centralized quality control and compliance; the same core services and adherence to Planned Parenthood Federation of America medical standards and guidelines; similar products and services at each clinic; virtually identical equipment; the exact same work performed, skills used, and job classifications at every Health Center; centralized marketing for all of the clinics; overwhelming commonality when it comes to human resources and labor relations

functions; and common training – all of which apply regardless of the state in which the APNs, RNs, and HCAs are located. (Record: 33, 159, 161-64, and 194-95). As stated in the case cited by the RD, *Transerv Systems*, 311 NLRB 766 (1993), evidence that employees perform similar functions is relevant when examining whether functional integration exists.

The RD focused largely on the degree of employee interchange and transfer as part of the functional integration analysis; however, the RD places undue emphasis on that factor in deciding to exclude the Southern Colorado, Nevada, and New Mexico locations. The RD's determination that the degree of interchange and transfer was sporadic is no different than what the Board encountered in *Acme* and found sufficient for purposes of concluding an overall unit was appropriate. Moreover, PPRM's evidence is more detailed and substantial than that presented by the employer in *Acme*. (Record: 220-29; Employer Exs. 26, 27 and 29).

iv. Job Duties and Skills.

The RD determined appropriately this fact overwhelmingly supports PPRM's proposed employer-wide unit. (Decision, pp. 16-17).

v. Terms and Conditions of Employment.

The RD determined appropriately this fact overwhelmingly supports PPRM's proposed employer-wide unit. (Decision, pp. 17-18).

vi. Extent of Union Organizing.

Though the RD specifically notes that the extent of a petitioner's organizing should not be controlling, that is precisely how it has been treated in this case, especially when considered in light of the above evidence and facts showing the high degree of functional integration and the fact that PPRM's overall unit (not the petitioned-for unit) tracks most closely with its administrative and supervisory organization. Only the proposed overall unit tracks with that structure.

c. The Decision Made in Connection With the Hearing Has Resulted in Prejudicial Error.

PPRM and the employees at its excluded locations have been prejudiced by the RD's decision, as described above in this Request for Review.

d. There Are Compelling Reasons for Reconsideration of an Important Board Rule or Policy.

In the Board's recent decision in *PCC Structural, Inc.*, Case 19-RC-202188 (Dec. 15, 2017), the Board overruled *In Re Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB 934 (2011). Under the *Specialty Healthcare* standard, the Board allowed unions to define a bargaining unit based on the extent of the union's organizing. In order for an employer to prevail in arguing that additional employees should be included in the bargaining unit, that standard required the employer to show that the excluded employees shared an overwhelming community of interest with the included employees. *See PCC Structural, Inc.*, Case 19-RC-202188 at 3-5. Although the RD does not mention *Specialty Healthcare* in the Decision, she nevertheless had asked the parties and their counsel in this case to comment on the potential application of the *Specialty Healthcare* standards. The Decision in this case reflects a *de facto* application of those standards, and visits upon PPRM the obligation to go beyond traditional community of interest standards to demonstrating an overwhelming community of interest between the petitioned-for unit of employees and the excluded employees. A simple reading of the Decision shows that the RD afforded extraordinary deference to the petitioned-for unit.

PCC Structural, Inc., rejects that approach, with the Board specifically discarding the previous overwhelming community of interest standard, and returning to the application of traditional community of interest factors. *See id.*; *see also General Counsel Memorandum OM 18-*

05, p.1. The Board reasoned that the *Specialty Healthcare* standard improperly detracts from the Board's statutory responsibility to make appropriate bargaining unit determinations and discounted – or eliminated altogether – any assessment of whether shared interests among employees *within* the petitioned-for unit are sufficiently distinct from the interests of *excluded* employees to warrant a finding that the smaller petitioned-for unit is appropriate. *Id.*

Here, this change in the law warrants review of the RD's Decision to analyze, using the traditional community of interest factors, whether the interests of PPRM employees within the petitioned for bargaining unit are sufficiently distinct from the interests of the employees at PPRM's Alamosa, Durango, Cortez, and Salida, Colorado; New Mexico; and Nevada facilities. PPRM respectfully submits that no such distinction exists in this case, and that the principles of freedom of choice, collective expression, and efficient and stable collective bargaining (all principles cited in the Decision, p. 5), will best be served by the employer-wide or overall unit sought by PPRM. *See also Id.* at 8.

IV. CONCLUSION

PPRM respectfully requests that the Board grant review of the RD's Decision and permit the parties to file briefs with the Board in accordance with § 102.67(h), along with such further relief that the Board deems appropriate.

Submitted this 11th day of January, 2018.

Sincerely,

/s/ Todd Fredrickson

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CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing **Request for Review of Decision and Direction of Election** to be filed via the Agency's E-Filing system to Paula S. Sawyer, Regional Director and served via email to counsel for the Petitioner in this action this 11th day of January, 2018.

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